IN RE ATTORNEYS FEES REQUEST OF

DNA--PEOPLE'S LEGAL SERVICES, INC.

IBIA 83-5-A Decided September 9, 1983

Application for attorney's fees under the Equal Access to Justice Act.

Application denied.

1. Equal Access to Justice Act: Application

When a decision disposing of the issues on appeal is entered, but the Board retains jurisdiction to review the response to its decision, an application for attorney's fees under the Equal Access to Justice Act, filed before the entrance of a decision or order finally concluding the litigation, may be (1) dismissed without prejudice as premature, (2) stayed until the completion of all proceedings, or (3) decided with an opportunity for additional action in accordance with the decision following completion of all proceedings.

2. Equal Access to Justice Act: Adversary Adjudication

The Equal Access to Justice Act clearly provides that the position of the United States in an adversary adjudication need not be presented by legal counsel. The Government's position is represented if other Government employees take an active adversarial role in the case.

3. Attorney's Fees: Equal Access to Justice Act--Equal Access to Justice Act: Awards

Pro bono representation and representation by a legal services organization do not constitute "special circumstances" within the meaning of 5 U.S.C. § 504(a)(1)

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(Supp. V 1981) so as to make an award of attorney's fees under the Equal Access to Justice Act unjust.

4. Attorney's Fees: Equal Access to Justice Act--Equal Access to Justice Act: Awards

An award of attorney's fees under the Equal Access to Justice Act may include compensation for work performed before Oct. 1, 1981, the effective date of the Act.

5. Equal Access to Justice Act: Adversary Adjudication

Under 43 CFR 4.603(a) (48 FR 17596 (Apr. 25, 1983)), the Department of the Interior has excluded from coverage under the Equal Access to Justice Act all adversary adjudications conducted by the Department except those that are specifically required by a statute.

6. Regulations: Generally

The Board of Indian Appeals does not have the authority to declare duly promulgated Departmental regulations invalid.

APPEARANCES: Stephen T. LeCuyer, Esq., DNA-People's Legal Services, Inc., Shiprock, New Mexico, for applicants; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for respondent. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On November 15, 1982, the Board of Indian Appeals (Board) received an application for an award of attorney's fees under the Equal Access to Justice Act (EAJA), P.L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 (Supp. V 1981). The application was filed by 19 appellants in cases before the Board 1/

1/ The 19 appellants are Matthew Allen, Wilbur Barton, Henry W. Begay, Johnny Begay, Bessie Benally, Arletta Bischoff, Irving Clark, Pearlene Dayzie, Janet Gordon, Leo Green, Francis Harvey, June James, Thomas Kee, Lester Kelwood, Juanita Paddock, Irma Shirley, Charity Tsosie, Leo Willie, and Francis Yazzie.

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(applicants) on behalf of their counsel, DNA--People's Legal Services, Inc. (DNA). The application is opposed by the Department of the Interior (Department, respondent). Under the regulations promulgated by the Department to implement the EAJA, the Board must deny the application.

Background

Applicants were each receiving care and training at Toyei Industries, Toyei, Arizona, under a contract with the Bureau of Indian Affairs (BIA) pursuant to the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. §§ 450-450n (1976). Each applicant was terminated from the program. Each appealed the termination and was represented by DNA. The appeal process involved hearings before BIA officials and eventually decisions by this Board. In each case, the Board found that the applicant's benefits had been improperly terminated. See 10 IBIA 146-463, 89 I.D. 508 (1982). The Board remanded the cases to BIA for the development of a plan to implement its holdings, and retained jurisdiction to review the plan. Final consideration of the plan for each applicant has not been completed.

On November 15, 1982, the Board received the present application. Respondent filed a motion to dismiss or to stay proceedings on December 29, 1982. Briefing was concluded on February 15, 1983.

Respondent's Motion to Dismiss

Respondent argues that this application must be dismissed because DNA was not a prevailing party in an adjudicatory proceeding before the

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Department. In making this contention, respondent cites to the Board's November 16, 1982, order docketing the application, apparently as proof that the application was filed by DNA, rather than by the appellants in the previous cases. Such "proof " appears only in the style of the case. For docketing purposes, the Board has found that less confusion results from styling an application for attorney's fees under the name of the attorney involved rather than under the name of the case giving rise to the application. The application itself clearly demonstrates that it was filed by the original appellants. 2/

Respondent's motion to dismiss is denied.

Respondent's Motions to Stay Proceedings

Respondent moved for a stay of consideration of this application on two grounds. First, respondent requested a stay until Departmental regulations implementing the EAJA could be promulgated. The Board need not consider this motion because such regulations were published while the case was pending. See 48 FR 17595 (Apr. 25, 1983).

Respondent next seeks a stay on the grounds that no final agency decision has been rendered in the cases giving rise to the application. This

2/ The Board notes that in Kinne v. Schweiker, Civ. No. 80-81 (D. Vt. Dec. 29, 1982), a case seeking an award of attorney's fees under the EAJA from the Department of Health and Human Services, the Government apparently argued that the application should have been made in the name of the legal clinic performing the work, rather than in the name of the party represented. See slip op. at 8.

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fact has resulted from the Board's retention of jurisdiction over the cases pending the development of plans for each applicant.

[1] The Board finds that counsel for applicants, in the absence of guiding regulations or decisions under the EAJA, properly filed an application within 30 days from the date of the decisions in the underlying cases. 3/ Without exact guidance, counsel acted prudently to ensure that any rights granted under the EAJA would be preserved. Under the circumstances of these cases, the Board finds that an application filed after the issuance of a decision disposing of the original issues raised, but retaining jurisdiction to review BIA's response to the decision, may be (1) dismissed without prejudice as premature, (2) stayed until the completion of all proceedings, or (3) decided with an opportunity for additional action in accordance with the decision following completion of all proceedings.

Based on its review of the filings in this case, the Board finds that it is appropriate to decide the issues raised at this time. Respondent's motion to stay is therefore denied.

Discussion and Conclusions

The EAJA was enacted primarily to diminish the economic deterrent to litigation by private parties contesting Governmental action. See, e.g., Conf. Rep. No. 96-1434 at 21, reprinted in 1980 U.S. Code Cong. & Ad. News

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3/ An application is required to be filed within 30 days of final disposition by section 504(a)(2) of the Act.

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5003, 5010. Congress believed that many individuals who had legitimate grievances about Governmental actions were not pursuing their cases because they were unable to afford legal counsel. The EAJA, therefore, provided for the recoupment of legal expenses in certain cases challenging governmental action. A second purpose of the EAJA was to deter unreasonable Governmental conduct by providing an avenue for effective opposition to such actions. See, e.g., H. R. Rep. No. 1418, 96th Cong., 2nd Sess. 9-10, reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4988.

Specifically, under section 504(a)(1):

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

The rest of the section provides standards for carrying out the congressional mandate. As previously mentioned, Departmental regulations implementing the EAJA have been published in the Federal Register and will be incorporated into 43 CFR Part 4, Subpart F. 48 FR 17595 (Apr. 25, 1983).

Initially, there is no dispute in this case that the 19 applicants meet the economic eligibility criteria for an award set forth in section 504(b)(1)(B). Neither can there be any dispute that applicants prevailed over the Department or that respondent's position in these cases was not substantially justified within the meaning of section 504(a)(1). See, e.g.

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Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982). Respondent, however, finds several other grounds for attacking the application.

Respondent argues that the requirement of section 504(b)(1)(C), that "the position of the United States [be] represented by counsel or otherwise" in the proceeding for which fees are sought, was not met. Presumably, respondent thus argues that it is unfair to award fees against the United States when it has not had an opportunity to defend its position, as discussed in the House floor debates on the bill. See 126 Cong. Rec. H10223 (daily ed. Oct. 1, 1980) (remarks of Rep. Kastenmeier).

Social security hearings are consistently cited in the legislative history of the EAJA as the type of adjudications in which the Government is not represented. In these hearings, only the claimant and his or her attorney appear before the Administrative Law Judge. There is no appearance, nominal or otherwise, by any person on behalf of the Government. See Conf. Rep. No. 96-1434 at 23, reprinted in 1980 U.S. Code Cong. & Ad. News, supra, at 5012. See also Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill. 1982).

[2] Although it is apparently true that no representative of the Solicitor's Office of the Department appeared in these cases until present counsel entered her appearance before the Board on May 6, 1982, it is not true that the Government was previously unrepresented. The statute makes it clear that representation need not be by legal counsel. The records of the initial hearings before BIA in these cases demonstrate without question that BIA employees appearing there were not mere disinterested witnesses, but instead took active adversarial roles in opposition to applicants' claims.

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See discussion in Applicants' Reply to Memorandum in Opposition to Application for Attorneys' Fees ("Reply Brief") at 14-18.

Whether or not these employees were acting within the scope of their authority in thus presenting the position of BIA, the Board must reject respondent's contention that the position of the United States was not represented in these proceedings.

Respondent next argues that "special circumstances make an award unjust" in this case. This argument, which refers to language found in section 504(a)(1) limiting the award of fees, states that because counsel for applicants is a legal aid organization which represented applicants pro bono and which received some amount of Federal support through the Legal Services Corporation, an award under the EAJA is inappropriate. Respondent argues that the purpose of the EAJA is to diminish the deterrent effect of bringing a case against the vast resources of the Federal Government. The argument concludes that because applicants were not deterred from bringing their cases because their legal costs were already being paid, an award does not further the purpose of the EAJA. Respondent cites Kinne v. Schweiker, Civ. No. 80-81 (D. Vt. June 30, 1982), in support of this argument.

In opposition, applicants cite several cases, including a recent Supreme Court case, Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 102 S. Ct. 3187 (1982), for the proposition that attorney's fees are properly awarded for pro bono work and to legal services organizations, even when such organizations receive funds from the sane governmental entity as the one against which a fees award is sought. The cited cases include awards sought

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under the EAJA as well as under other statutes allowing the recovery of attorney's fees.

Applicants further show that the one case cited by respondent in support of its position was reversed upon rehearing by the Federal district court rendering it. See Kinne v. Schweiker, Civ. No. 80-81 (D. Vt. Dec. 29, 1982). In the slip opinion of its December 29 decision at pages 3-4, the court stated:

> The primary purpose of the EAJA is to diminish the economic deterrent to litigation by private parties contesting governmental action. In our earlier opinion we noted that an award of fees to pro bono organizations does nothing to advance this purpose. Upon reflection this is not strictly true.
>
> * * * It is uncontroverted and obvious that the Legal Clinic's budget is limited and that this limits the number of clients it may accept. * * * While it is true that an individual with a patently strong case could probably retain counsel with the incentive of an EAJA award at the successful conclusion, not every strong case appears that way on first inspection and the contingent nature of EAJA awards, combined with the ambiguity of the substantial justification standard, poses an obstacle to individuals seeking representation. Because of its pro bono character, the Legal Clinic may employ a less rigorous calculus and serve the useful function of advancing those cases which although meritorious, do not at first appear to be strong enough to warrant an EAJA fee award. To the extent it does so, and receives such an award, the primary purpose of the EAJA is served by enhancing the Clinic's capability to serve financially needy individuals with claims against the government.

See also Filippo v. Secretary of Health and Human Services, ___ F. Supp. ___, 51 U.S.L.W. 2705 (E.D.N.Y. May 4, 1983).

[3] The Board agrees with the reasoning of the Vermont District Court. It further finds that the weight of judicial construction of attorney's fees

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statutes, including the EAJA, is "that publicly-funded legal services organizations may be awarded fees." Seattle School Dist. No. 1, supra at 3204 n.31. Respondent has presented no arguments showing that these constructions should be ignored by the Department. Therefore, the Board finds that the facts that applicants' counsel were from a legal services organization and performed work pro bono do not constitute "special circumstances" making an award of fees unjust within the meaning of section 504(a)(1). Cf. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980) (award sought under the Civil Rights Attorney's Fees Award Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988 (1976)).

Respondent next argues that, even if some award is found due to applicants, an award for work performed before October 1, 1981, the effective date of the EAJA, is inappropriate because sovereign immunity was not waived for such expenses and because the cost estimates for implementation of the bill presented to Congress clearly did not envision such a potentially large Federal liability. Under this argument, respondent contends that, although the EAJA applies to any case pending before the Department on October 1, 1981, the statute did not clearly and unequivocally waive sovereign immunity as to costs incurred before that date. See United States v. Mitchell, 445 U.S. 535, 538 (1980); Brookfield Construction Co. v. United States, 661 F.2d 159 (Ct. Cl. 1981) (interpreting the interest provision of the Contract Disputes Act of 1978, 41 U.S.C. § 611 (Supp. II 1978)).

[4] The Board adopts applicants' response to this contention:

> The Department argues that no award under the Act may be made for work performed prior to October 01, 1981. This

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contention has been rejected by nearly every court addressing the question. * * * [4/] Nunes-Correia v. Haig, 543 F. Supp. 812 (D.D.C. 1982); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. 1982); Underwood v. Pierce, 547 F. Supp. 256 (C.D. Calif. 1982); Wolverton v. Schweiker, 533 F. Supp. 420 (D. Id. 1982); National Lawyers Guild v. Attorney General, 94 F.R.D. 616 (S.D.N.Y. 1982). Other cases have allowed fees for work done prior to October 01, 1981 without discussion of the retroactivity question. Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 679 F.2d 64 (5th Cir. 1982); [rehearing denied, 691 F.2d 502 (5th Cir. 1982);] Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill. 1982); Constantino v. United States, 536 F. Supp. 60 (E.D.Pa. 1982).

The specific arguments put forth by the Department have been raised by the government in earlier cases and have been rejected. The Department's reading of the Act has been found "so strained" that the plain language of the Act was held to authorize fees for work prior to October 01, 1981. Nunes-Correia v. Haig, 543 F. Supp. at 815. By applying the Act to cases pending on October 01, 1981, it was held that "Congress waived the sovereign immunity bar for work performed on those pending cases before the Act's effective date." Underwood v. Pierce, 547 F. Supp. 261 n.7. The Department's argument based on the Congressional Budget Office cost estimates for the Act has been rejected because "[t]he statistical reasoning underlying this argument is flawed." Nunes-Correia v. Haig, 543 F. Supp. at 815. The courts have been aware of Brookfield Construction Co., Inc. v. United States, 661 F.2d 159 (Ct Cl. 1981), but have declined to follow it. Nunes-Correia v. Haig, 543 F. Supp. at 816; National Lawyers Guild v. Attorney General, 94 F.R.D. at 620. The Court of Claims has itself considered the Act and gave no indication that it would distinguish between work done before or after October 01, 1981. Kinzley v. United States, 661 F.2d 187 (Ct. Cl. 1981). [5/] Finally, courts have relied on a number of decisions--including two Supreme Court cases--allowing fees under other fee statutes for work performed prior to the effective date of the act in question. Underwood v. Pierce, 547 F. Supp. at 260-261; Nunes-Correia v. Haig, 543 F. Supp. at 816.

Reply Brief at 22-23.

4/ Applicants cite Commodity Futures Trading Comm'n v. Rosenthal & Co., 537 F. Supp. 1094 (N.D. Ill. 1982), as the only case that had not granted attorney's fees for work performed prior to Oct. 1, 1981. In that case, the court deferred decision on the question. Attorney's fees were eventually denied on the grounds that the applicant was not a "prevailing party" within the meaning of the EAJA. Commodity Futures Trading Comm'n v. Rosenthal & Co., 545 F. Supp. 1017 (N.D. Ill. 1982).

5/ Kinzley and Brookfield were decided on the same day.

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The Board finds that if an award is proper under the EAJA, all attorneys fees, including those for work performed prior to October 1, 1981, may be included in the determination of the final award.

Respondent's remaining argument is that no award is appropriate because the Departmental review in applicants' cases was not "required by statute to be conducted by the Secretary under 5 U.S.C. 554." 43 CFR 4.603(a) (48 FR 17596 (Apr. 25,1983)). This regulatory requirement is based on the Secretary's interpretation of section 504(b)(2), as it incorporates 5 U.S.C. §§ 551 and 554(a) (1976). Section 4.603(a) states:

> These rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554. Specifically, these rules apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing. These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554. [Emphasis added.]

Applicants concede that their appeals were not required by statute to be conducted under section 554. Instead, they argue that the due process provisions of the United States Constitution, as interpreted by the Supreme Court in Wong Yang Sung v. McGrath, 339 U.S. 33, modified, 339 U.S. 908 (1950), require such a hearing. In Wong Yang Sung, the Supreme Court stated:

> We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. * * * They exempt hearings

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> of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it [Congress] as a matter of expediency.

339 U.S. at 50.

[5] It is clear that under section 4.603(a), and especially the highlighted portions of that regulation, the Department intended to exclude all adversary adjudications conducted by the Department except those that are specifically required by a statute. In the absence of an express Departmental intention to include any other proceedings, including, as argued here, one necessitated by the Constitution, the Board is bound by the parameters set by the Department. 6/

[6] Applicants' argument seeks a determination that section 4.603(a) violates the statute it attempts to implement. The Board is not the proper forum to consider this argument because it does not have the authority to declare a duly promulgated Departmental regulation invalid. See Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (0perations), 11 IBIA 214, 90 I.D. 283 (1983); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983). 7/

6/ Although the Board reversed the BIA decision terminating applicants' welfare benefits on due process grounds, it has never held that the cases were required to be conducted under the procedures set forth in section 554.

7/ Because of this disposition, the Board does not reach the question of whether the amount of fees sought in this case is reasonable.

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Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this application for the award of attorney's fees under the Equal Access of Justice Act must be denied.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry Muskrat
Administrative Judge

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